IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ~~1921~~ 95

STATE OF WISCONSIN,
Appellant,

v.

NORMA GRACE CONSTANTINEAU,
Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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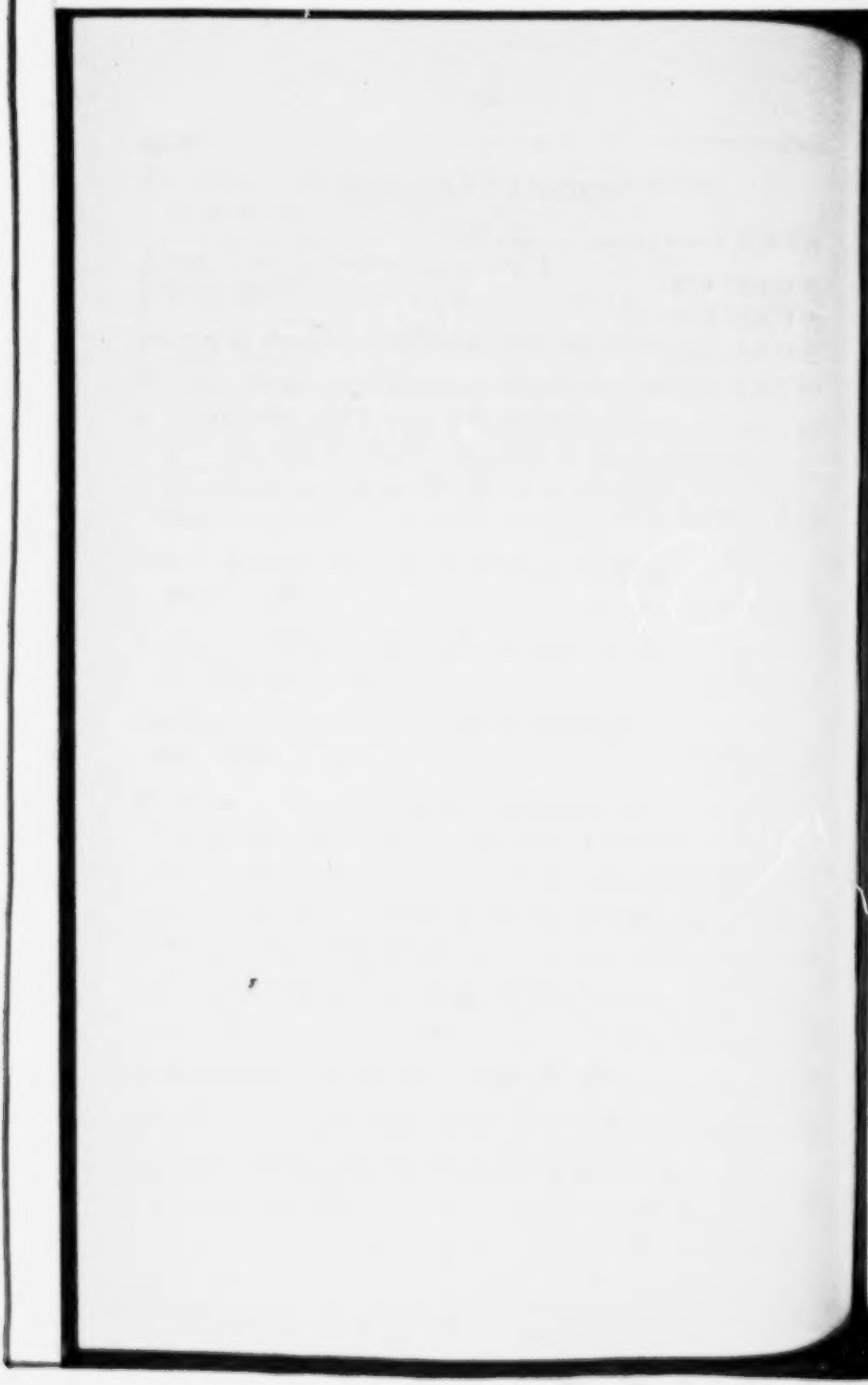
INDEX

TABLE OF CITATIONS

Page

Page

OTHER AUTHORITIES



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No.

NORMA GRACE CONSTANTINEAU, Appellee

v.

JAMES W. GRAGER, CHIEF OF POLICE OF HARTFORD, WISCONSIN, Defendant
STATE OF WISCONSIN, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

Appellants appeal from an order of the United States District Court for the Eastern District of Wisconsin (see Appendix B) entered on November 25, 1969, holding secs. 176.26 and 176.28 (1), Wis. Stats., to be unconstitutional on their face and enjoining defendant and appellant from enforcing the provisions of said statutes. Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The entire opinion, including findings of fact, conclusions of law, and judgment, of the United States District Court for the Eastern District of Wisconsin is reported in 302 F.Supp. 861 (1969) and is set forth hereto as Appendix A.

JURISDICTION

This cause of action was brought under 28 U.S.C. §2281 and §2284 to enjoin the actions of defendant Grager taken pursuant to secs. 176.26 and 176.28 (1), Wis. Stats. The order of the three-judge District Court was entered on November 25, 1969, and notice of appeal was filed in that Court on December 24, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253 and §2101 (b).

QUESTIONS PRESENTED

(1) Do secs. 176.26 and 176.28 (1), Wis. Stats., violate the procedural due process requirement of Amendment Fourteen, Section 1, United States Constitution?

(2) Did the lower court err in refusing to allow appellant to call witnesses and elicit testimony at the hearing on defendant's and appellant's motion for judgment on the pleadings, at which hearing it was agreed that the sole issue for determination was the constitutionality of secs. 176.26 and 176.28 (1), Wis. Stats.?

(3) Did the lower court err in basing its opinion of August 13, 1969, that secs. 176.26 and 176.28 (1), Wis. Stats., were unconstitutional upon an assumption that appellee would be exposed to "unfounded public defamation, embarrassment, and ridicule" by the operation of said Wisconsin Statutes, when no such facts appeared in the record nor were they correct in fact?

STATUTES INVOLVED

Secs. 176.26 and 176.28 (1), Wis. Stats., are involved in this case and are set forth in Appendix *C* hereto.

STATEMENT

Defendant James W. Grager is chief of Police of the City of Hartford, Wisconsin, and he held that position on January 23, 1969. On January 23, 1969, defendant Grager, in his capacity as Chief of Police of the City of Hartford, Wisconsin, and acting pursuant to secs. 176.26 and 176.28 (1), Wis. Stats., posted a notice in all of the retail liquor outlets in the City of Hartford, Wisconsin. A copy of this notice was attached to appellee's complaint. This notice, posted in accordance with secs. 176.26 and 176.28 (1), Wis. Stats., informed the notified persons or establishments that they were forbidden "to sell or give away to [appellee] Norma Grace Constantineau any intoxicating liquors of whatever kind for a period of one year from date, under pain of the penalties provided by secs. 176.26 and 176.28 (1), Wis. Stats." This notice was signed by defendant James W. Grager as Chief of Police of the City of Hartford, Wisconsin, on January 23, 1969. Appellee then effected the personal service of summons and complaint upon defendant James W. Grager on January 27, 1969. The cpmplaint in its first cause of action asserted a claim for damages under 42 U.S.C. 1983 and 28 U.S.C. 1343 (3); the second cause of action called for the convening of a three-judge panel under 28 U.S.C. 2281 and for an injunction on the ground that secs. 176.26 and 176.28 (1), Wis. Stats., were unconstitutional. Defendant Grager answered the first cause of action and moved to separate it from the second cause of action. A pre-trial conference was held on March 25, 1969, before the Honorable John W. Reynolds, United States

District Judge for the Eastern District of Wisconsin. At this pre-trial conference, the State of Wisconsin moved to intervene as a defendant in the second cause of action and to separate the first cause of action from the second. These motions were granted orally by the court at the pre-trial conference. Defendant Grager and Appellant State of Wisconsin then moved for judgment on the pleadings, which motion was held in abeyance. It was then agreed among the parties that the sole issue for determination of the defendant's and appellant's motion for judgment on the pleadings was whether secs. 176.26 and 176.28 (1), Wis. Stats., were on their face constitutional. A hearing before the three-judge panel was held on June 6, 1969. The three-judge Court issued its opinion, United States Senior Circuit Judge F. Ryan Duffy dissenting, on August 13, 1969, holding that the Wisconsin statutes in question were on their face unconstitutional. This opinion is set forth in Appendix A. The Court entered its order on November 25, 1969. This order is set forth in Appendix *B*. Appellant State of Wisconsin filed its notice of appeal on December 24, 1969.

THE QUESTIONS ARE SUBSTANTIAL

Secs. 176.26 and 176.28 (1) of the Wisconsin Statutes, as set forth in Appendix C, vest certain enumerated local officials with the power to "post" other persons as habitual drunkards and to send notice to that effect to anyone within their jurisdiction who might sell or give alcoholic beverages to the "posted" person. Penalties are set forth for those who sell or give away alcoholic beverages to a "posted" person after having received such "posting" notice. Notice and hearing are not provided to the posted person. The issue before

this Court is whether this statuutory scheme, which is found in fifteen states other than WWisconsin (see Appendix E), provides (procedural) due proceess as required by the Fourteenth Amendment to the UUnited States Constitution.

The requirements of proceduural due process vary in any particular circumstance. As thhe Court noted in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L. Ed. 2d 1230 (1961):

> " ' . . . The very naturee of due process negates any concept of inflexible proceddures universally applicable to every imaginable situationn [citing cases]. . . . "[D]ue process" unlike some legal rules, is not a technical conception with a fixed contentt unrelated to time, place and circumstance.' "

To answer the issue beforee this Court, one must weigh the nature of the government function against the private interest affected by that govvernment function. *Cafeteria Workers v. McElroy, supra*, 367 U.S. 895.

Looking at the governmentt function of regulating traffic in intoxicating beverages, Senicior Circuit Judge Duffy stated in his dissenting opinion, beloww, page 7a, Appendix A, that:

> ". . . the well-establishhed law [is] that the states of our country possess a very high degree of police power in all matters pertaining to tthe regulation of intoxicating liquors,"

Senior Circuit Judge Duffy citeed *Crane v. Campbell*, 245 U.S. 304, 308, 38 S.Ct. 98, 99, 62 L.Ed. 304 (1917); *Samuels v. McCurdy*, 267 U.S. 188, 45 S.Ct. 264, 69 L.Ed. 568 (1925); *Crowley v. Christensen*, 137 UU.S. 86, 90-91, 11 S.Ct. 13, 15, 34 L.Ed. 620 (1890), for this proposition. *Lewis v. City of Grand Rapids*, 356 F.2d 276, 2885-289 (1966) contains a recent restatement of the broad regulilatory power over intoxicating liquors possessed by the stateres. Senior Circuit Judge Duffy

also correctly noted in his dissenting opinion that this great police power of the states was increased by the passage of the Twenty-First Amendment to the United States Constitution, citing 48 C.J.S. Intoxicating Liquors § 33, p. 167.

Looking at the private interest of appellee Constantineau which was taken away by the government action under the statutes in question, it appears that the only right withdrawn was the right to obtain intoxicating liquors from the drinking places "posted" by defendant Grager within the City of Hartford, Wisconsin (1960 population 5,627: U.S. Census 1960). This right was withdrawn for a period of one year. The right to hold intoxicating liquors for personal use is not a fundamental right of citizens which no state may abridge. *Crane v. Campbell,* supra, 245 U.S. 308.

The majority below found an interest of appellee ". . . in not being exposed to unfounded public defamation, embarrassment, and ridicule." (Page 5a, Appendix A). That such an interest of appellee Constantineau was affected by the government action in this case is an assumption made by the majority having no basis in fact. The Court erred in not allowing appellant State of Wisconsin to elicit testimony relative to this point, Appellant had subpoenaed appellee Constantineau, who was present at the June 6, 1969 hearing; defendant Grager was also present to testify at this hearing (see Appendix D). Since the sole issue at the June 6, 1969 hearing was the constitutionality of secs. 176.26 and 176.28 (1), Wis. Stats. (see page 1a-2a, Appendix A), it would have been relevant for the lower court to hear testimony regarding the application of the statutes in the present case as an example of the general application of these statutes.

The lower court further erred in applying the above-cited balancing test of *Cafeteria Workers*, supra, to the facts

of this case. Other cases in which *Cafeteria Workers* was cited or applied and in which government action without a hearing was upheld reveal fact situations in which the private interest involved was more substantial than in this case and/or where the government power was not as great as in this case.

One line of these "no hearing" cases involves the summary discharge of government employees from their positions. Such discharge can be accomplished validly without a hearing. *Finfer v. Caplin*, 344 F. 2d 38 (1965); *Chafin v. Pratt*, 358 F. 2d 349 (1966); *Herak v. Kelly*, 391 F. 2d 216 (1968); *Jones v. Hopper*, 410 F. 2d 1323 (1969). The government function in such cases is that of maintaining a healthy civil service. *Jaeger v. Freeman*, 410 F, 2d 528 (1969). A hearing must be held, however, whenever a government employee is discharged in such a manner as to attach a stigma or badge of disloyalty which would affect his reputation and tend to limit his ability to secure employment elsewhere or would damage his career. *Slochower v. Board of Higher Education of the City of New York*, 350 U.S. 551, 555, 76 S.Ct. 637, 100 L.Ed. 692 (1956); *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L. Ed. 216 (1952); *Birnbaum v. Trussell*, 371 F. 2d 672, 678-679 (1966). (The preceding three cases did not cite *Cafeteria Workers*.)

Another related factor to consider in determining the requirements of procedural due process in any given situation is the alternatives available to the individual after the government action. *Cafeteria Workers*, supra, 367 U.S. 896, 898-899; *Parker v. Board of Education of Prince George's County, Md.*, 237 F.Supp.222, 228-229 (1965), aff'd 384 F. 2d 873 (1967), cert. denied, 390 U.S. 982, rehearing denied, 390 U.S. 1018, 393 U.S. 903.

The facts in this case reveal no stigma upon appellee's reputation in any manner which would affect her economically. It is also apparent that appellee was still free after defendant Grager's action to obtain intoxicating liquors anywhere except within the City of Hartford, Wisconsin.

Other "no hearing" cases citing the balancing test of *Cafeteria Workers* involve the barring of individuals from military bases by the base commander. The power of the government is great in regard to regulating its internal affairs and maintaining the national security. *Cafeteria Workers,* supra, 376 U.S. 896; *Weissman v. United States,* 387 F. 2d 271 (1967). Even when an individual's right to employment at a particular location has been withdrawn by the government, the action has been upheld even though a hearing was not held. *Cafeteria Workers,* supra. *United States v. Jelinski,* 411 F. 2d 475 (1969), is an excellent example of the application of the *Cafeteria Workers* test to uphold the exclusion of a civilian from a military base without notice and hearing. The Court weighed the unfettered power of the government to regulate military bases against the slight economic advantage to the individual in using the base facilities.

In applying the *Cafeteria Workers* balancing test, the courts have upheld the imposition by governmental administrative agency action of economic competition upon a business without the granting of notice and hearing to that business. Despite the great interest of the individual business, due process has been held not to require notice and hearing. *Law Motor Freight Inc. v. Civil Aeronautics Board,* 364 F.2d 139 (1966), cert. denied, 387 U.S. 905; *Continental Bank v. National City Bank,* 245 F.Supp. 684 (1965). A more esoteric economic interest of the regulated business

was withdrawn by government action without notice and hearing in *Fugazy Travel Bureau Inc. v. Civil Aeronautics Board*, 350 F.2d 733 (1965).

Finally, the courts have applied the *Cafeteria Workers* test to hold that a state may revoke a parole without granting the parolee notice and a hearing. *Rose v. Haskins*, 388 F.2d 91 (1968), cert. denied, 392 U.S. 946.

Appellee Constantineau had a means of obtaining a review of the actions of defendant Grager in "posting" her, namely, she could have sought a judicial review of the reasonableness of his actions by a common law writ of certiorari. *State ex rel.Thomson v. Nash*, 27 Wis. 2d 183, 194, 133 N.W. 2d 769 (1964); *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 199-200, 94 N.W. 2d 711 (1958). The court in *Sessions v. State of Connecticut*, 293 F.Supp. 834, 839, (1968) considered the availability to the plaintiff of the common law writ of mandamus while applying the *Cafeteria Workers* test to hold that plaintiff permanent state employee was not entitled to a hearing upon discharge from his government job.

Appellant State of Wisconsin asserts that the lower court improperly applied the *Cafeteria Workers* test in finding the necessity for notice and a hearing in this case. After all, "It cannot be contended either that due process *never* requires notice, a hearing, confrontation, and right to cross-examine, or that it *always* requires such procedures." *Murray v. Vaughn*, 300 F.Supp. 688, 706 (1969). In light of the relative balance between the government's power and the individual's interests found in the above cases in which due process was held not to require a hearing, and in light of the great government power in regulating liquor traffic and the miniscule private interest of obtaining liquor in the City of Hartford, Wisconsin, for one year, the lower court was incorrect in invalidating an important statutory scheme of the State of Wisconsin.

There are numerous factors which reflect the importance of this case: (1) The Court could clarify the requirements of due process in regard to instances where notice and hearing are not required. In view of the modern increase in government intervention into the private affairs of citizens and the expanding nature of due process, it is important to the practical operation of government that it be able to take some minimal action, such as the action taken in this case, without the necessity of notice and a hearing, and it is important both to government and to all private citizens to have a clarification by this Court of the circumstances under which government can so act; (2) An important section of the statutes of the State of Wisconsin has been held unconstitutional by a federal tribunal; (3) This federal tribunal was divided, with a dissenting opinion by Senior Circuit Judge F. Ryan Duffy; (4) Alcoholic posting statutes nearly identical to the statutes in question, with no provision for notice and a hearing, are found in fifteen other states (see Appendix E).

Appellant State of Wisconsin believes that the issues presented in this appeal are so substantial and are of such public importance that they require plenary consideration with briefs on the merits and oral arguments, for their resolution.

Respectfully submitted,

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